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IN THE

Supreme Court of the United States

No. — 631

October Term, 1957

EMRAY REALTY CORP.,

Appellant,

v.

ROBERT C. WEAVER, as State Rent Administrator,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

Jurisdictional Statement

ARNOLD SCHILDHAUS,
Attorney for Appellant,
320 E. 149th Street,
Bronx, New York.

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IN THE

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EMRAY REALTY CORP.,

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v.

ROBERT C. WEAVER, as State Rent Administrator,

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

Jurisdictional Statement

Appellant appeals from the judgment of the Court of Appeals of the State of New York rendered on May 16, 1957, refusing leave to appeal and from the dismissal of appellant's appeal as of right on April 4, 1957.

The statement is submitted for the purpose of showing that the Supreme Court of the United States has jurisdiction to hear this appeal and that a substantial question is presented.

Opinions Below

The Court of Appeals has rendered two opinions in this case, officially reported in 307 N. Y. 772 and 309 N. Y. 878; besides making various rulings on motions, officially reported in 309 N. Y. 898; 2 N. Y. 2nd 848; 2 N. Y. 2nd 973.

Jurisdiction

(i) This action was brought in the Supreme Court for the State of New York pursuant to Section 8589 of the Unconsolidated Laws of the State of New York (McKinney). Jurisdiction in causes of this nature is conferred upon the Supreme Court, County of New York pursuant to the above mentioned section.

(ii) The date of the judgment of the Court of Appeals, here sought to be reviewed, is May 16, 1957, on which date said Court filed its journal entry refusing and denying appellant's motion for leave to appeal; having previously on April 4, 1957 dismissed appellant's appeal as of right. Appellant filed its notice of appeal with this Court on July 3, 1957.

(iii) The statutory provision believed to confer jurisdiction of the appeal upon this Court is Section 1257 of Title 28 of the United States Code.

(iv) The cases believed to sustain the jurisdiction of the Supreme Court of the United States to hear this case are *Fiske* v. *State of Kansas*, 274 U. S. 380 (1927); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 (1921); *Bowles* v. *Willingham*, 321 U. S. 503 (1944); *Munn* v. *Illinois*, 94 U. S. 113 (1876).

(v) This appeal draws in question, the validity of c:755 of the Laws of 1957 of the State of New York and its predecessors, as applied in this case by the Court of Appeals. Such statute is an Emergency Housing Rent Control Law passed because "a serious public emergency continues to exist in the housing of a considerable number of persons in the State of New York, which emergency was created by war".

Questions Presented by the Appeal

The following questions are presented by this appeal:

1. Whether or not the emergency housing rent control law passed as a war emergency measure by the Federal Government, and almost every state in the Union, still is a war emergency measure alone in the State of New York.

2. Whether or not the State of New York may, because of this emergency, take the property of the appellant.

3. Whether or not the State of New York may create a new class of serfs, bound to their buildings, who may not withdraw their building from the rental market, may not even abandon their buildings, but are chained to the building, and who, if they try to walk away from such buildings are imprisoned.

4. Whether or not the State of New York can compel an owner or an individual, to operate a property at a substantial loss, deny to him a profit, compel, by penal sanctions, the operation of the property at a substantial loss to the owner.

5. Whether or not the State of New York may enforce a law for the benefit of a preponderant voting majority, as against a small class with little voting power.

Statement of the Case

1. The Facts

Emray Realty Corp., the appellant herein, is the owner of a Harlem tenement containing 18 apartments of seven and eight rooms each. It became owner; by a deed in lieu of foreclosure. The building is more than 50 years old.

On January 9, 1953, application was made to a local rent office of the Temporary State Housing Rent Commission to withdraw this house from the rental market. It was denied without even being processed by the Local Rent Administrator; and, in due course, the petition to withdraw this house from the rental market was refused by the Court of Appeals in a case officially reported at 307 N. Y. 772. Appellant's case was predicated on the facts presented, that the property lost more than $10,000 a year; that appellant was subjected to imprisonment; and that the cost of removing these violations were, as the estimates submitted showed, the amount of $40,490.00; greatly in excess of the value of the building. Photographs and the violations placed by the Department of Housing and Buildings of the City of New York were also submitted.

The next phase of this case occurred when the Temporary State Housing Rent Commission, without a hearing, reduced rents in this house in half, because of the failure of the appellant to make repairs. Appellant contended that, since by the terms of their agreement, the tenants

had agreed to make their own repairs, it would be inequitable to reduce rents because of the failure of the tenants to honor their contract. The Supreme Court, New York County, dismissed appellant's petition. This was reversed by the Appellate Division, First Department (officially reported at 284 App. Div. 880) which remitted the whole proceeding back to the Commission. In the course of its opinion, the Court stated, "In 1951, the Rent Administrator in connection with an earlier decision, ordered that the burden of certain maintenance and repairs was to fall on the tenants, and the landlord now alleges, that some of the present violations are chargeable to the tenants failure to meet this burden. We find in the record, no denial by the Administrator that such prior order of 1951 was made and is outstanding."

The next phase was that the Rent Administrator made a new order transferring the obligation of making repairs from the tenants to the landlord and when landlord did not make the repairs reduced the rents by 40%. This went to the Court of Appeals which reversed the two orders and remitted to the Temporary State Rent Commission, to hold a hearing why this house should not be withdrawn from the rental market.

In the record before the Court of Appeals was the first of many convictions of the attorney for the appellant, who neither owns stock nor is an officer of the owning corporation, for violation of the Multiple Dwelling Law, in which he was given 30 days in the Workhouse, by a magistrate without jurisdiction. After serving 5 days, the attorney was admitted to bail and a writ of habeas corpus sustained.

Also, in the record was the fact that no rent was collected and the landlord required to operate the building. Rent did not have to be paid to the landlord because of Section 1446a of the Civil Practice Act of the State of New York, that provides that if there are violations against a property, a landlord may not collect rents even though the violations were created by the tenants and by the terms of their contract the tenants were obliged to remove these violations. Despite the fact that no rent was collected, appellant was required to operate the building or go to prison. This was because of Section 2040 of the Penal Law of the State of New York which provided six months imprisonment or two year probation for failure to furnish services to a tenant.

The hearing held by the State Rent Commission that followed was a kangaroo court. Witnesses for appellant were threatened and refused to appear. Contractors were warned that if they testified, they would be driven out of business. The hearing officer was an inquisitor in a court of inquisition. There was only testimony by appellant; there was no testimony by anyone to contradict a statement of appellant or any testimony by a tenant or anyone else for the tenant's case. The application to withdraw was denied; and still another order transferring the obligation of making repairs from the tenants to the landlord was made.

The decision was made in view of proof that the property lost $30,000 in its yearly operation: was in such a deplorable physicial state that it should be closed up: that the tenants did not pay rent—one tenant had not paid

rent for 15 months despite innumerable court orders requiring her eviction, had, on being evicted moved back, and 12 months after such illegal entry, was still in the building because of the refusal of some minor officials to enforce the law: that the attorney for the appellant had been held as hostage to continue the operation of this building: that he has spent 50 days in prison, and has been sentenced to 60 days, which is on appeal, and faces in the near future, 4 years in prison. This attorney was reported to the Bar Association for possible disciplinary action, reported to the United States Treasury Department as a possible tax evader: reported to the District Attorney as a possible perjurer. All of these have found no merit in such reports.

Again, it went to the courts. The Supreme Court dismissed the petition and the Appellate Division, First Department unanimously affirmed, without opinion, and surprisingly, the Court of Appeals dismissed the appeal as of right and refused leave to appeal.

Back of such refusal is the tremendous adverse publicity received by appellant and its attorney. Both were unskilled in public relations, and the cause was unpopular. The prominence given the attorney and the case was out of proportion to their importance.

Moreover the New York State Rent Regulations provide that if there are violations, a landlord is not entitled to a return (Section 33).

2. How the Federal Question Is Presented

Throughout these protracted proceedings, appellant insisted that the Emergency Housing Rent Control Law was unconstitutional. Appellant insisted that it could not be compelled to operate a building that lost $30,000 a year; that this was confiscation. Appellant insisted that the law was unconstitutional in not permitting it to withdraw this house from the rental market. That a law which held a man as hostage and made him a serf attached to a building was unconstitutional. That a combination of laws that prevented the collection of rents and forced the owner to continue operation of the building and compelled the imprisonment of its attorney was unconstitutional. These and other questions were presented on the appeal.

3. The Federal Question is Substantial

The various questions raised by this appeal have been recurrently before this Court. They can be divided into many questions. The question of rent control has been before this Court in *Block* v. *Hirsch*, 256 U. S. 135; *Marcus Brown Holding Co.* v. *Feldman*, 256 U. S. 179; *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242; *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393; *Bowles* v. *Willingham*, 321 U. S. 503.

All of these stand for the proposition that emergency rent law may be passed, but that they must be temporary and must provide for reasonable compensation (*Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 at page 416, Mr. Justice Holmes), and that a "taking" could not be enacted nor could an owner be compelled to offer any accommodations for rents (*Bowles* v. *Willingham*, 321 U. S. 503).

Appellant states that a State may provide that certain minimum health and safety measures be complied with, before a landlord may offer a house in the rental market. It also states that if the landlord finds it unprofitable to meet these standards, he should not be compelled to operate a property against his wishes.

This Court has, on many occasions, considered the question raised on this appeal of confiscation: *Munn* v. *Illinois*, 94 U. S. 113; *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522; *Tyson and Bro.* v. *Banton*, 273 U. S. 418, 431; *St. Joseph Stock Yards* v. *U. S.*, 298 U. S. 38; *Smyth* v. *Ames*, 169 U. S. 460; *Minnesota Rate Cases*, 230 U. S. 352; *Cooley, Constitutional Limitations*, 8th Edition, p. 758; *Bluefield Co.* v. *Public Service Commission*, 262 U. S. 679, 690; *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19 at pp. 48 to 50; *Smith* v. *Illinois Bell Telephone Co.*, 278 U. S. 581, 591.

This Court has also on many occasions considered the question of serfdom that is raised by this case. The owner and its attorney want one thing above all others,—to be unchained from this building; for the right to walk away from this building: for the right to withdraw this house from the rental market. In *Clyatt* v. *U. S.*, 197 U. S. 207 and other cases, this problem has been many times examined.

Moreover, this is not an isolated case. There are 53,208 old law tenements in New York City (buildings at least 56 years old: there are 22,116 buildings between 45 and 56 years old). Each of these, because of rent control, skyrocketing prices (inflation), and the fact that if there is a

violation a building can be compelled to be operated at a loss, is in the same position as appellant.

The emergency in housing no longer exists. Since 1950, the population of the City of New York has decreased 7% (U. S. Census, Special Report on New York City): More than 472,000 new apartments have been erected, an increase of almost 23%, yet the emergency persists. Due to the fact that rents are frozen at 15% above the depression level of 1943, occupancy by an individual of many apartments is common. Moreover, in 1943, rent took 24% of a wage earner's income. Today in New York City, it takes 11% as against a national average of 19%.

4. The Appellate Jurisdiction of the Court Is Properly Evoked

The applicable portion of Section 1257 of the Judicial Code, 28 U. S. C. S. 1257 provides as follows:

> "Final judgment or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed as follows: • • • (2) by appeal, where is drawn in question, the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. • • •"

Appellant contends that the New York State Emergency Housing Rent Control Law passed as a war emergency measure is unconstitutional. This law is founded on a legislative declaration of an emergency—which emergency the appellant denies—is being enforced 11 years after the

war. This asserted emergency is itself perpetuated by the rent control legislation. Appellant asserts that the law and the regulations issued by the State Rent Administrator with the force of law, which require an owner to operate a property at a loss, refuse to an owner the right to withdraw his property from the rental market, creates serfs bound to the building they own, and to the tenants who occupy it (an inverse historical relationship), that confiscates the property of an owner: that with other laws sends anyone it can lay its hands on to prison for refusal to operate a building: that in connection with other laws does not allow an owner to collect rents, yet compels the operation of the building, that such a law is unconstitutional. At best, the law as applied in this case is unconstitutional (*Fiske* v. *State of Kansas*, 274 U. S. 380; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282).

ARNOLD SCHILDHAUS,
Attorney for Appellant.

APPENDIX

Order of Affirmance of Appellate Division

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 5th day of February, 1957.

Present:

HON. CHARLES D. BREITEL, *Justice Presiding,*
" BENJAMIN J. RABIN,
" MARTIN M. FRANK,
" FRANCES L. VALENTE,
Justices.

10716

In the Matter of the Application

of

EMRAY REALTY CORP.,

Petr.-Aplt.,

for an order under Article 78 of the Civil Practice Act,

against

ROBERT C. WEAVER, State Rent Administrator,

Respt.

An appeal having been taken to this Court by the petitioner-appellant from an order of the Supreme Court, New York County entered on the 18th day of July, 1956, denying petitioner's application for certificates of eviction

for a Harlem tenement which petitioner wished to withdraw from the rental market, and said appeal having been argued by Mr. Arnold Schildhaus of counsel for the appellant, and by Mr. Edward V. Alfieri of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same hereby is affirmed with $20 costs and disbursements to the respondent.

Enter:

JAMES A. CLYNES
Deputy Clerk

APPELLATE DIVISION OF THE SUPREME COURT,
FIRST JUDICIAL DEPARTMENT,
Clerk's Office, County of New York.

I, VINCENT A. MASSI, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing is a copy of the order made by said court upon the appeal in the above entitled action or proceeding, and entered in my office on the 5th day of February 1957.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, in the County of New York, this 25th day of November 1957.

VINCENT A. MASSI
Clerk

(SEAL)

Order of Court of Appeals Granting Motion and Dismissing Appeal

At a Court of Appeals for the State of New York, held at Court of Appeals Halls in the City of Albany on the fourth day of April A. D. 1957.

Present:

HON. ALBERT CONWAY, *Presiding Chief Judge.*

Mo. No. 116

In the Matter of the Application of

EMRAY REALTY CORP.,

Petitioner-Appellant,

for an order under Article 78 of the Civil Practice Act,

against

ROBERT C. WEAVER, as State Rent Administrator,

Respondent,

and

THOMAS V. SINCLAIR, Local Rent Administrator,

Respondent.

A motion having heretofore been made upon the part of the respondent Robert C. Weaver, as State Rent Administrator, to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and appeal dismissed, with costs and ten dollars costs of motion, upon the ground that no substantial constitutional question is presented.

/s/ GEARON KIMBALL
Deputy Clerk

Opinion of Court of Appeals

(Emray Realty Corp. v. McGoldrick—307 NY 772)

Appeal dismissed, with costs, for the reasons stated in the following memorandum: While a constitutional right to withdraw real property from the rental market exists in an appropriate case, this appeal must be dismissed upon the ground that the asserted constitutional questions are not directly and necessarily involved in the decision appealed from. Kaney v. N. Y. State Civil Service Commission, 298 NY 570, 81 N. E. 2d 105; Haydorn v. Carroll, 225 NY 84, 121 N. E. 463.

All concur.

Opinion of Court of Appeals

(Emray Realty Corp. v. Charles Abrams—309 NY 888)

PER CURIAM

The record before us is so confused and so incomplete as to prevent a determination as to whether or not the State Rent Administrator's application of the provisions of the rent laws here involved is confiscatory and thereby denied petitioner due process of law. This is an unusual case and in the interest of justice, it seems to us that the matter should be remitted to the Rent Administrator with directions to conduct a full hearing (and keep a complete record thereof), at which petitioner may call witnesses and present evidence concerning the subject premises, their cost and value, the income derived and the rents due and/or collected therefrom, the expenses of operation and maintenance, the building violations or other violations filed or recorded against the premises, the repairs made in or about them, the reasonable cost of rectifying violations, and also these and any other specific evidence should be admitted bearing upon the question whether petitioner should be permitted to withdraw the premises from the rental market.

The order of the Appellate Division and that of Special Term should be reversed and the matter remitted to the State Rent Administrator to proceed in accordance with the Per Curiam opinion herein.

All concur except Dye, J., taking no part.

Note as to Opinions

The issues before the Court of Appeals in this case were the right of the State Rent Commission to transfer the obligation of making repairs from the tenants to the landlord—the tenants had agreed in consideration of a reduced rent to do their own repairs—; and a reduction of rent by the Commission of all the apartments in this house based on landlord's failure to make the repairs after the order of the Commission transferring this obligation to make repairs from the tenants to the landlord. The Court of Appeals reversed both orders; and at the same time reversed themselves as to the first of the printed opinions, the right to withdraw this house from the rental market by ordering a hearing. This was not an issue before the Court. In the second case, landlord went up as a matter of right, after a unanimous affirmance by the Appellate Division, First Department, a motion to dismiss the appeal was denied by the Court. In the case before this Court for review, landlord again went up as a matter of right, and surprisingly, the Court dismissed the appeal. The explanation is that the Court of Appeals decides which case they will hear by a majority vote, and the membership of the Court had changed between the two cases.